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No. .....

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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KIRBY FOREST INDUSTRIES, INC.

v.

UNITED STATES OF AMERICA

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

*Of Counsel:*
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## QUESTIONS PRESENTED

1. Whether, under the Fifth Amendment, in a "straight" condemnation of unimproved real property pursuant to 40 U.S.C. § 257, the date of taking for the purpose of calculating interest due, if any, on the award is (i) the date the landowner is effectively denied the economically viable use and enjoyment of the property or (ii) the date of payment of the award.

2. Whether the Supreme Court should resolve the conflict which exists on the above matter between the Fifth and Ninth Courts of Appeal.

3. Alternative to the first question, whether under 16 U.S.C. § 698 (the act establishing the Big Thicket National Preserve) the date of taking was (i) the date of valuation or (ii) the date of the filing of the commission's report or (iii) the date of the judgment or (iv) such other date as may be determined under the facts of this case.

4. Whether the Court of Appeals erred in failing to sustain the finding of the District Court that Kirby was deprived of the beneficial use of its property as of the filing of the complaint in condemnation, in the absence of a holding that such finding was clearly erroneous.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Kirby Forest Industries, Inc. ("Kirby") petitions for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of such court in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, A-1 — A-15, styled *United States of America* v. *2,175.86 Acres of Land*) is reported at 696 F2d 351. The opinion of the District Court (App. B, infra, B-1 — B-11) is reported at 520 F. Supp. 75.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1983. Kirby filed its motion for rehearing on February 5, 1983, which was denied by the Court by order entered on March 10, 1983 (App. C, infra). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) (1976).

## CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part:

> ". . . nor shall private property be taken for public use without just compensation."

40 U.S.C. §257 (1976) provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

The provisions of 16 U.S.C. §698, Pub. L. 93-439, Oct. 11, 1974, 88 Stat. 1254-61, the authority creating the "Big Thicket National Preserve," under which this condemnation proceeding was filed, are attached (App. D, infra, D-1 — D-7).

## STATEMENT OF THE CASE

This action began on August 21, 1978, by the filing of a complaint in condemnation by the United States (hereafter the "Government") to acquire 2,175.86 acres of land owned by Kirby for part of the Beaumont Unit of the Big Thicket National Preserve in East Texas. Kirby is an integrated forest products manufacturer, owning timberlands in East Texas and Louisiana to supply the raw material for its manufacturing facilities.

The condemnation matter was referred by the District Court to Commissioners under Fed.R.Civ.P. 71A. At the opening of

the Commission's hearings, in response to the inquiry of the chairman regarding stipulations, a stipulation was announced by counsel for the Government and for Kirby that that day, ~~May~~ March 6, 1979, was the date of taking.

The instructions given by the District Court to the Commission included a definition of the phrase, "date of taking," as follows:

> "The 'date of taking' must be and is fixed as of the date the Government took possession of the land and denied the landowner its use and benefit."

All valuation testimony before the Commission was directed to the "date of taking" stipulated by the parties.

After the entry of the Commission's Report on March 3, 1980, and a review by the District Court of the parties' objections thereto, the court, on August 13, 1981, entered its judgment adopting the Commission's findings and awarding to Kirby the sum of $2,331,202.00, plus interest from August 21, 1978 (the date the complaint was filed) until the deposit of the award. The Government, on March 26, 1982, after the matter had been lodged on appeal to the Fifth Circuit Court of Appeals, and some *three years* after the stipulated date of taking, filed the award, including the interest increment, in the registry of the Court.

The District Court determined that the date of the taking was the date of the filing of the complaint (contrary to the stipulation of the parties), based upon the court's conclusion that the "condemnation proceedings instituted by the United States Government have effectively denied Defendant (Kirby) economically viable use and enjoyment of its property since it is prevented from continuing its timber business."

Both Kirby and the Government appealed. Kirby complained of the rate of interest allowed, of the failure of the court to consider and give effect to evidence of higher value and of the

Commission's lack of compliance with the reasoning specificity required by *United States* v. *Merz*, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629 (1964), and commented on the action of the Court in disregarding the "date of taking" stipulation. The Government complained of the granting of interest from the date of the filing of the complaint and also complained of the Commission's lack of compliance with *United States* v. *Merz*.

The United States Court of Appeals for the Fifth Circuit reversed, Judge Jolly concurring in part and dissenting in part. The majority held that because the Government had not taken actual possession, the date of the payment of the award was the date of taking and that, therefore, no interest was due, and remanded the case for compliance with *Merz*. Judge Jolly concurred in the remand because of the inadequacy of the Commission's report, but dissented on the question of the determination of the date of taking and, hence, the entitlement of Kirby to interest. Judge Jolly expressed the view that at least by the entry of a judgment in condemnation of unimproved property (distinguished from income-producing or improved property, which continues to provide benefits to the landowner) the landowner is "shackled from making economically viable use of his property," and, therefore, suffers a taking of his property at such time (if not before). While the majority explicitly rejected the holding of the Ninth Circuit on this question expressed in *United States* v. *156.81 Acres of Land*, 671 F.2d 336 (9th Cir.), cert. den. ____ U.S. ____, 103 S.Ct. 569, 74 L.Ed.2d ____ (1982), Judge Jolly specifically noted his agreement with such opinion.

## REASONS FOR GRANTING THE PETITION

As stated by the Government in its Petition for Writ of Certiorari to this Court in the Ninth Circuit case mentioned above, *United States* v. *156.81 Acres of Land*,[1] "*(t)his case presents an*

[1] October Term, 1982, No. 82-552, cert. den., ____ U.S. ____, 103 S.Ct. 569, 74 L.Ed.2d ____. See Appendix, infra, App. E, E-

*important and recurring question concerning the government's obligation to pay interest in straight condemnation cases.*" (emphasis supplied). The question is no less important in this case and, for the purpose of review by this Court, must be viewed as of significantly greater importance because of the conflict on this matter between the Ninth Circuit in *United States* v. *156.81 Acres of Land*, and the Fifth Circuit in this case, which conflict did not exist at the time of the prior petition.

There is, therefore, squarely presented for review a direct conflict between Federal Courts of Appeals, the character of reason for review specifically provided for in Rule 17.1(a) of the Rules of this Court.

There is presented at the same time an opportunity for this Court either to clarify its former opinion in *Danforth* v. *United States*, 308 U.S. 271, 60 S.Ct 231, 84 L.Ed. 240 (1939), the generality of which has led to varying interpretations regarding the determination of the entitlement to interest in condemnation cases, or to restrict such opinion to the facts there before the Court.

Of particular significance in this case is the impact of the intended public use — a wilderness preserve — upon the "possession and use" of the condemned tract by the landowner prior to both the judgment and the date of payment of the condemnation award.

We shall address each of the above elements in the short discussion to follow.

The obvious point of departure is the mandate of the Fifth Amendment that "just compensation" is required for the taking of private property for public use. While it is recognized that interest is payable only as a part of just compensation, *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 67 S.Ct.

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1 — E-13 for the text of the Government's petition, excluding appendices.

398, 91 L.Ed. 521 (1947), the certainty that the compensation must be "just" requires the intervention of this Court to settle the recurring questions regarding the determination of the time of the taking.

The Government does not have the right or the power to prejudice the rights of a landowner by the manner in which the Government elects to proceed to condemn private property. Thus, the question is not whether the Government proceeds under a legislative taking, a declaration of taking under 40 U.S.C. § 258a (1976), or a "straight" condemnation under 40 U.S.C. § 257 (1976). The Fifth Amendment requires that whenever a taking for public use occurs, just compensation must be made. The question in the context of a straight condemnation, therefore, is whether a taking in fact has occurred prior to the payment of the award and, if so, when.

Is there a consistent analytic litmus which aids in the determination of whether a taking occurs prior to the date of payment in "straight" condemnations of unimproved real property? Is there a rational basis for distinction in this context between improved and unimproved property? The answer to both questions is, "yes." The test, long recognized by this Court and confirmed as recently as 1978 in *Penn Central Transportation Company* v. *City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), is that a taking occurs when there is such an interference with the investment-backed expectations of the landowner that the uses and expectations of the landowner relating to the land are wholly frustrated. See *Goldblatt* v. *Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908). This principle found early and definitive exposition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) where a state statute forbidding the mining of coal under certain circumstances was held to constitute a taking of the rights of a coal company

because the statute effectively destroyed the right to mine for coal.

See also *United States* v. *Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), where overflights were held to have destroyed the present use of the property for a chicken farm, and thus constituted a taking.

Second, there is a rational and valid basis for distinction between unimproved and improved property in the "taking" context. The basis for distinction is inescapably intertwined with the interference analysis long made by this Court to determine the question of when a taking occurs. In this analysis, one of the "several factors that have particular significance," *Penn Central*, is the *economic impact* of the interference. While not alone controlling, the severity of the economic impact may be more readily ascertained — and will be relatively greater — in the case of property which has no income-producing use or potential other than the use which the interference prevents. Thus, a taking will be more readily demonstrated in the case of unimproved than improved, income-producing property, where the owner continues to receive *some* economic benefit.[2]

The Fifth Circuit in this case, contrary to the Ninth Circuit in *United States* v. *156.81 Acres*, placed great (and, apparently, controlling) emphasis on whether the Government had taken possession. It held (1) that "... the mere commencement of straight condemnation proceedings, where the government does not enter into possession during those proceedings does not constitute a taking," there citing a footnote from *Agins* v. *City of*

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[2] This distinction takes into consideration the frequently-cited rule that the mere entry of a judgment in condemnation does not constitute a taking (absent a prior taking) where the landowner continues to receive the economic benefit of the property until payment, possession or divestiture of title. See, e.g., *Danforth; Gould* v. *United States*, 301 F.2d 557 (D.C. Cir., 1962). Where, however, there is *no* economic benefit to be received, all benefits being frustrated by the governmental interference, such rule has no application.

*Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) and (2) relying upon *Danforth*, that where the government condemns without entering into prior possession and there had been no previous taking " 'in actuality or by a statutory provision which fixes the time of taking by an event . . .' ", " 'the taking . . . [took] place upon the payment of the money award by the condemnor . . .' " (citing 308 U.S. at 284, 60 S.Ct. at 236, footnotes omitted).

The Fifth Circuit also was critical of the District Court here in what it referred to as speculation by the lower court that the government would not "permit the cutting of even one tree when the purpose of these proceedings is to preserve the land in question for public use as a wilderness park," holding that there was "no showing" made that the filing of the complaint "deprived the landowners of the use of their property so as to constitute a taking, . . ." despite the trial court's specific finding to the contrary.[3]

The Ninth Circuit, on the other hand, specifically addressed the situation where the deprivation reaches "taking" proportions prior to payment of the award and, in its reasoning, balanced the interests of the government and the landowner, holding that in cases such as the instant matter, "a condemnation judgment forces the landowner to hold property which generates liabilities but no benefits, perhaps excepting recreational benefits not present here . . . effectively (taking) the condemnee's land by denying any economically viable use."

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[3] The afterthought by the Fifth Circuit Court that recreational use would remain available to Kirby totally ignores the economic effect of the interference for which the Fifth Amendment requires compensation. In this respect, it is interesting to note that the Fifth Circuit apparently also ignored its own opinion in *Hernandez* v. *City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), an inverse condemnation case, which held that a taking occurs if the landowner is denied any economically viable use of the land.

Not only is the condemnee burdened by the inability to make any economically viable use, said the Ninth Court, but, in addition, "No one would buy land which the government could take at an already settled price (and) (no) landowner would build on land which the government could take for the price of the land before it had been improved."[1]

The reasoning of the Ninth Circuit, we submit, is consistent with, while that of the Fifth Circuit is contrary to, the mandate of the Fifth Amendment that compensation shall be "just." The fallacy in the reasoning of the Fifth Circuit Court is that it is not the possession, *vel non*, of the government or the "accretion of a right or interest to the sovereign" which constitutes the taking, but the deprivation of the owner which is the operative event. *United States* v. *Rogers*, 255 U.S. 163, 41 S.Ct. 281, 65 L.Ed. 566 (1921); *Seaboard Air Line Railway Co.* v. *United States*, 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664 (1923); *United States* v. *General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *Dugan* v. *Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d. 15 (1963). The proper thrust of this emphasis was underscored by this Court most recently in *Penn Central*, where the Court, in footnote 25, (438 U.S. at 123) said:

> "As is implicit in our opinion, we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel."

The fallacy of requiring possession by the Government in order to support a "taking" is made even clearer under the facts of our case. The purpose of the condemnation was to preserve a

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[1] The Government is protected in its interests under this rationale, however, because, as noted in *Danforth*, it still has the right to determine "whether the valuations leave the cost of completion within his resources," *Danforth*, 308 U.S. at 284, and thus may yet dismiss, subject to review by the District Court under Rule 71A(i)(3), Fed. R. Civ. P.

wilderness. This purpose is totally inconsistent with any development or use of the land, particularly for timber growing and cutting to provide resources to a forest products manufacturer. It is not necessary, moreover, in order to preserve a wilderness in its pristine condition, that the Government actually take possession. No construction of a building, dam or levee is necessary to accomplish the purpose of the taking. In fact, the *absence* of possession is more consonant with the purposes of the condemnation. Under the rationale of the Fifth Circuit Court, Kirby stands penalized for supporting the purpose of the Big Thicket National Preserve by refraining from doing what the Fifth Circuit's rationale would entitle them to have done: *cut down the trees.* The logical extension of the Court's reasoning could result in the total frustration of the intent of Congress by allowing a landowner to ruin the "wilderness," which the condemnor obviously would not permit, yet the Fifth Circuit held that the Government, "had not substantially interfered with the landowner's rights in their property prior to payment, . . ."

Further, it is clear that *Danforth* does not require the result reached by the Fifth Circuit Court. We address the *Danforth* holdings directly although there are reasonable grounds for distinction.[5]

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[5] Principal among the grounds for distinction are:

1) this Court, in *Danforth*, specifically limited its holdings to condemnations under the Flood Control Act of May 15, 1928, 33 U.S.C. §§ 702a-702m;

2) the case was not a condemnation case, but was one to enforce a contract between the landowner and the government fixing value for acquisition;

3) the case, by reason of the preceding ground, "passed out of the range of the Fifth Amendment," *Albrecht* v. *United States*, 329 U.S. 599, 67 S.Ct. 606, 91 L.Ed. 532 (1947), and thus is not authoritative on the question of the scope of the Fifth Amendment in the determination of a date of taking under facts differing from those found in *Danforth;*

First, *Danforth* does not require a holding that the date of payment is the date of taking in straight condemnation cases. This Court was careful to note that such result would not follow where ". . . a taking has occurred previously in actuality . . . , which fixes the time of taking by an event such as the filing of an action, . . ." 308 U.S. at 284. The eventuality is preserved, therefore, that a taking may occur prior to the date of payment.[5]

The *Danforth* court further held that, "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." This analysis, however, does not address the situation, where, as here, the governmental interference wholly frustrates the use of the property by the landowner by depriving him of any economically viable use. By the generality of such language, lower courts may have been led into more restrictive holdings (as was the Fifth Circuit here) than the proper construction of the Fifth Amendment allows. For instance, the Fifth Circuit in its opinion in this case said "*Danforth* holds that a taking does not occur until payment is made . . ." 696 F. 2d at 356. Clearly, *Danforth* does not so hold.

Finally, it must be said that *Danforth* does provide a test for the determination of when taking occurs in a case such as this. In its discussion relating to the construction of the set-back levee in that case, the Court held that for the completion of the levee

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4) construction activities were contemplated by the Flood Control Act construed in *Danforth* which would effect a taking only when completed according to specification. Here no possessory act by the government is contemplated by the act creating the Big Thicket National Preserve in order to give effect to the purpose of the condemnation.

[5] This Court, therefore, need not overrule *Danforth* in order to uphold the correct Ninth Circuit reasoning applicable to the questions presented here.

to amount to a taking, "it must result in an appropriation of the property to the uses of the government." 308 U.S. at 286.

Remembering that actual possession is not required, *Penn Central*, the question here becomes whether and at what point in time the actions of the Government effectively resulted in "an appropriation of the property to the uses of the government," *consistent with the purposes of the interference*, by denying to the landowner the economically viable use for which the property was being held.

What are the "uses of the government" in a condemnation for a wilderness preserve? Such "uses" are simply to accomplish *non-use* by the owners, thereby preventing utilization of the property in any manner inconsistent with the integrity of the lands as a wilderness. How is this "use" accomplished? Must the landowner threaten or undertake a conflicting use in order to force the Government to act to stop him (thereby establishing a possessory act by the Government)? We are not without guidance from this Court in answering these questions: it is the "character of the governmental action," which here has "particular significance," *Penn Central*, 438 U.S. at 124. The character of the governmental action here was to seek to establish a wilderness preserve, first by the declaration of the purpose, followed by the institution of condemnation proceedings. This goal is effectively accomplished by "chilling" activity relating to the designated lands so as to prevent uses conflicting with the goal. We submit that neither actual possession by the Government nor threats of conflicting use nor an injunction or other order are required to evidence the chilling of activity which accomplishes the "uses of the government." It is clear, then that the mere existence of the proceedings is sufficient to cause a forest products manufacturer to refrain from harvesting its trees, thereby resulting in an "appropriation" of the economic purpose for which the land was being held. Further, neither sale nor development of the land was possible, both being effectively "chilled" by the existence of the condemnation proceedings.

There can be no question but that the purposes of the Government were accomplished here long before the payment of the award.[7]

The question remains, at what point in time did the taking occur in this case? Logically, from the foregoing discussion, the date of the filing of the complaint, as found by the District Court, is the obvious choice, particularly because by that time the Government had not only designated the lands to be included in the preserve, as required by the statute [See 16 U.S.C. 698(b)], and had published the descriptions, but had also begun the formal procedures to obtain title to the lands. Although conflicting uses may have been chilled prior to the filing of the complaint, most certainly the chilling effect was complete by such time and, further, by that time the Government had definitely asserted its intent to take the property and had taken all of the steps required for the taking except for payment of the award, and could no longer dismiss the case at will under Rule 71A, Fed. R. Civ. P. See *Gerlach Livestock Co.* v. *United States*, 76 F.Supp. 87 (Ct.Cl., 1948), aff'd, 339 U.S. 725, 70 S.Ct. 995, 94 L.Ed. 1231 (1950); and see *United States* v. *59.29 Acres of Land*, 495 F.Supp. 212 (E.D. Tex., 1980).

The above result does not unduly restrict or abridge the rights of the sovereign discussed in *Danforth*. For example, it does not commit the Government to the payment of interest prior to the determination of the award. The interest portion of the award is merely calculated from the date of taking. Also, the Government could still withdraw from the condemnation. In addition, the Government could prevent the accrual of interest at any time by the depositing of funds in the registry of the Court.

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[7] That Kirby agreed to refrain from cutting the timber, as noted by the Fifth Circuit in its opinion, 696 F.2d at 355, doing so without an order from the Government that it so refrain, is itself evidence of the chilling effect of the action by the Government.

The choice of the date of filing is not out of harmony with the choice of the date of judgment by the Ninth Circuit Court in *United States* v. *156.81 Acres of Land*, supra. Each choice is predicated on a determination, based upon the facts of each case, of the time when the action of the government "effectively takes the condemnee's land by denying any economically viable use," id. 671 F.2d at 339.[8] The basic point of conflict between the two Circuits regarding the distinction between improved and unimproved property is therefore resolvable under the facts of this case.

Further, it should be pointed out that if the Fifth Circuit view should prevail, the government would be given the authority to delay payments of awards literally for years, (as it has done here) and thereby avoid the payment of interest, despite the fact that the landowner is effectively prevented from any use of his property in the interval. Based upon an overbroad application of *Danforth*, such view is without support under the correct analysis required by Fifth Amendment and posited here.

There remains one additional consideration relevant to the determination of the time period during which interest should be due. From the inception of this case, Kirby has regarded the "date of taking" concept as a term of art. The parties stipulated that *the date of the hearing* before the Commissioners was the date of taking. The stipulation was entered into formally [not informally as in *United States* v. *Mahowald*, 209 F2d 751 (8th Cir., 1954), relied upon by the Court of Appeals in refusing to give effect to the stipulation] and under circumstances indicating

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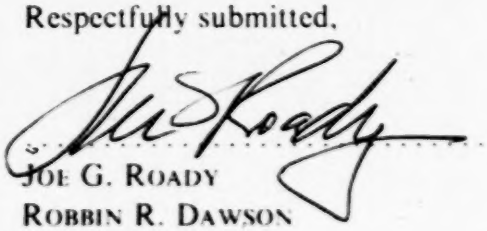
[8] The Ninth Circuit, in later case involving the same project, *United States* v. *15.65 Acres of Land*, 689 F.2d 1329 (9th Cir., 1982), again held that when the owner had been deprived "of all economic use of his land," a taking occurs, but it also held that the date of taking in that case was the date of *valuation* rather than the date of the judgment, applying a rule of "justness and fairness" based upon *Penn Central*.

intention to provide certainty not only as to the date of valuation, but also as to all other effects of that term of art in condemnation matters. Kirby concedes, therefore, that interest should *not* begin on the date of the filing of the complaint, even though that date is the proper date of taking absent the effectiveness of the stipulation. Such concession requires that interest be calculated from the date of the hearing even though the date of taking may have preceded that date, unless this and the other courts may properly disregard the stipulation of the parties. Compare *Fibreboard Paper Products Corp.* v. *United States*, 355 F.2d 752 (9th Cir., 1966) and *United States* v. *15.65 Acres of Land*, supra, note 8.

## CONCLUSION

To review these important questions relating to Federal condemnations and to resolve the conflict thereon between the Fifth and Ninth Courts of Appeals, this petition for writ of certiorari should be granted.

Respectfully submitted,



JOE G. ROADY
ROBBIN R. DAWSON

*Of Counsel:*
SHEINFELD, MALEY & KAY

**UNITED STATES of America, Plaintiff-Appellant Cross Appellee,**

**v.**

**2,175.86 ACRES OF LAND, MORE OR LESS, SITUATED IN HARDIN AND JEFFERSON COUNTIES, STATE OF TEXAS, et al., Defendants,**

**Kirby Forest Industries, Inc., Defendant-Appellee Cross Appellant.**

**UNITED STATES of America, Plaintiff-Appellant,**

**v.**

**13.32 ACRES OF LAND, MORE OR LESS, SITUATE IN JEFFERSON COUNTY, STATE OF TEXAS, Bob C. Mabry, et al. and Unknown Owners, Defendants-Appellees**

**Nos. 81-2402, 81-2471.**

United States Court of Appeals, Fifth Circuit.

Jan. 24, 1983.

Before RUBIN, RANDALL and JOLLY, Circuit Judges.

RANDALL, Circuit Judge:

These two consolidated cases present the question whether the United States is obligated to pay interest on an award in a straight condemnation proceeding, and if it is, from what date the interest should accrue. The first of these cases, *United States v. 2,175.86 Acres of Land*, also involves a challenge to the sufficiency of the commission's findings concerning the actual award. For the reasons set forth below, we reverse, 520 F.Supp. 75, and remand for proceedings consistent with this opinion.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On October 11, 1974, Congress established the Big Thicket National Preserve in southeast Texas, and authorized the Secretary of the Interior to acquire the land within the boundaries of

the preserve. 16 U.S.C. § 698 (1976). These cases involve the acquisition of 2,175.86 acres of land located in Hardin and Jefferson Counties, Texas, and approximately 13.32 additional acres in Jefferson County, Texas.

The larger tract was owned by Kirby Forest Industries. On August 21, 1978, the United States filed a complaint in condemnation seeking to condemn the Kirby tract. The action was referred to a commission appointed pursuant to Fed.R.Civ.P. 71A. The trial was held in March of 1979. On March 3, 1980, the commission entered its report recommending an award of $2,331,202.00. Both the United States and Kirby filed objections to the commission's report in April, 1980. The district court held a hearing to consider these objections in January, 1981, and entered a judgment on August 13, 1981, awarding Kirby the amount proposed by the commission plus interest at the rate of six percent from August 21, 1978 (the date the complaint was filed), until the date of deposit of the award. The United States filed a notice of appeal on October 8, 1981, and Kirby filed its notice on the 9th. Payment was made on March 26, 1982.

At the opening of the trial before the commission, the parties stipulated that "today is the date of taking" so that the trial date could serve as the date on which market value could be determined. Both sides presented expert testimony concerning the highest and best use of the property and the physical description of the land.

The United States filed a second complaint in condemnation to obtain the smaller tract owned by Bob C. Mabry and his associates. The landowners filed an answer, demanding an award of just compensation, expenses, attorneys' fees and interest on the award. As in the first case, the action was tried before a commission. On January 24, 1980, the district court entered judgment in the amount of $94,998.24, as recommended by the commission. The judgment was vacated in February, 1980, and an amended judgment entered on April 3, 1980, which reserved

for consideration the landowners' request for attorneys' fees, expenses and interest. On April 17, 1980, the government deposited the full amount of the award with the court. On September 28, 1981, the court denied the landowners' claim for expenses, but granted interest on the award at the rate of six percent from the date the complaint in condemnation was filed. Upon a motion of the landowners filed on October 9, 1981, the court amended its judgment to allow interest at the rate of nine percent, as provided by state law. The United States filed two notices of appeal.

## II. INTEREST FROM THE TIME OF TAKING.

The government may appropriate property for public use in a number of ways: by physical occupation, *United States* v. *General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); by the bringing of condemnation cases as in the present case, *United States* v. *Bodcaw Co.*, 440 U.S. 202, 99 S.Ct. 1066, 59 L.Ed.2d 257 (1979) (per curiam); or by vesting in the government immediate title to the property through legislative action. *Miller* v. *United States*, 209 Ct.Cl. 135, 531 F.2d 510 (1976). When the government proceeds by condemnation, it generally employs one of two methods: (1) a declaration of taking or (2) "straight condemnation." Under the Declaration of Taking Act, 40 U.S.C. §258a (1976), the government obtains title to the land immediately upon filing a declaration of taking and depositing the estimated amount of just compensation with the court. If just compensation as judicially determined is greater than the deposit, the government must deposit the difference with interest from the date of taking.[1]

In the cases before us, the government employed the "straight condemnation" method by filing a complaint in condemnation pursuant to 40 U.S.C. §257 (1976). Unlike section 258a, section

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[1] The government need only pay interest on the deficiency, since the amount on deposit has already been paid. 40 U.S.C. §258a; *see also United States* v. *Blankinship*, 543 F.2d 1272, 1275 (9th Cir. 1977).

257 does not state that title shall vest immediately in the United States once the action is commenced. The question before us is when the government proceeds by straight condemnation, what is the date of taking.

We note at the outset that both parties agree, as indeed they must, that where there is a delay between the time of taking and the time of payment, the landowner is entitled to interest as a part of just compensation. This entitlement is constitutionally mandated by the fifth amendment for just compensation "is the full and perfect equivalent of the property taken." *Seaboard Airline Railway Co.* v. *United States*, 261 U.S. 299, 304, 43 S.Ct. 354, 355, 67 L.Ed. 664 (1923). This rule "rests on equitable principles and it means substantially that the owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken." *Id.; see also United States* v. *Rogers*, 255 U.S. 163, 41 S.Ct. 281, 65 L.Ed. 566 (1921). Where a taking precedes payment, the landowner "is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added." *Seaboard*, 261 U.S. at 306, 43 S.Ct. at 356. We must turn then to the question of when the taking occurred in these cases.

The district court awarded interest from the date the complaints were filed until the time that payment was made, reasoning that the commencement of condemnation proceedings "effectively denies [the landowners] economically viable use and enjoyment of [their] property . . ." Record at 573. Mabry would have us adopt the date the Big Thicket National Preserve was established by statute as the date of taking, on the ground that the statute represented the government's commitment to the project. In essence, he maintains that the statute was actually a legislative taking. Kirby concedes that it can find no support for the district court's position; it argues instead that the date of

taking was the date of trial. The government contends, relying on *Danforth* v. *United States*, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 (1939), that a taking did not occur until the date of payment, in which case no interest was due. We agree with the government that no interest was due in these cases.

Mabry's argument is easily disposed of. The legislative history of 16 U.S.C. §698 indicated that Congress did not intend the statute to be a legislative taking; in fact, the Senate committee specifically deleted the legislative taking provision because is felt that "legislative taking is an extraordinary measure which should be invoked only in those instances in which the qualities which render an area suitable for national park status are imminently threatened with destruction. The Committee does not believe that the Big Thicket area represents such an instance." S.Rep. No. 875, 93d Cong., 2d Sess. (1974), *reprinted in* 1974. U.S.Code Cong. & Ad.News 5554, 5558.[2]

In *Danforth*, the Supreme Court held that the mere enactment of legislation which authorizes condemnation could not be a taking, because "[s]uch legislation may be repealed or modified, or appropriations may fail." 308 U.S. at 286, 60 S.Ct. at 237 (footnote omitted). The Court went on to hold that for an action to constitute a taking, "it must result in an appropriation of the property to the uses of the Government." *Id.* (footnote omitted). No such appropriation occurred through the enactment of 16 U.S.C. §698. Mabry has not demonstrated that the enactment of the statute interfered with his enjoyment of his property or his present expectations for its use. *See Agins* v.

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[2] Mabry casts aspersions on Congress's decision to delete the legislative taking provision, suggesting that the decision was designed solely to avoid the government's obligation to pay interest. Congress was actually concerned about the possible postponement of the acquisition of previously authorized areas, as well as the problem of paying interest. S.Rep. No. 93-875, *supra*. We note further that there is nothing in the fifth amendment that prohibits the government from choosing the least costly method of acquiring property as long as the requirements of just compensation are met.

*Tiberon* (sic), 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The property was purchased as an investment, and it has remained in the same condition throughout the condemnation proceedings. Accordingly, we hold that the enactment of the statute establishing the preserve was not a taking within the confines of the fifth amendment.

Similarly, the mere commencement of straight condemnation proceedings, where the government does not enter into possession during those proceedings, does not constitute a taking. *Agins, supra*, 447 U.S. at 255, n. 9, 100 S.Ct. at 2138 n. 9, 65 L.Ed.2d at 106 n. 9; *see also United States* v. *156.82 Acres of Land*, 671 F.2d 336 (9th Cir.), *cert. denied*, .... U.S. ...., 103 S.Ct. 569, 74 L.Ed.2d .... (1982). The Supreme Court held in *Agins:*

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. More fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

447 U.S. at 255 n. 9, 100 S.Ct. at 2138 n. 9, 65 L.Ed.2d n. 9 (citing *Danforth, supra*, 340 U.S. at 285, 60 S.Ct. at 236). The government did not enter into actual possession of Kirby's or Mabry's properties prior to payment, and indeed it apparently has yet to take possession of the properties. The district court recognized that the diminution of property value standing alone would not constitute a taking. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed.2d (sic) 303 (1926); but it speculated that the government would not "permit the cutting of even one tree when the purpose of these proceedings is to preserve the land in question for public use as a wilderness park." Record at 573. Kirby conceded in oral argument,

however, that while it and other landowners had voluntarily agreed, long before the commencement of these proceedings, not to cut timber on the land within the preserve, it was under no orders from the government not to reinstate logging operations. Since there has been no showing made that the filing of the complaint deprived the landowners of the use of their property so as to constitute a taking, the district court's award of interest from the date of filing must be reversed.

In *Danforth*, the United States condemned the landowner's property pursuant to the Flood Control Act of May 15, 1928, 33 U.S.C. §§702a 702m (1976). As in the cases before us, the government proceeded by petitioning for condemnation without entering into prior possession. The Supreme Court held that under those circumstances, where there had been no previous taking "in actuality or by a statutory provision, which fixes the time of taking by an event . . .," that "the taking in a condemnation suit under the statute [took] place upon the payment of the money award by the condemnor," and that no interest was due on the award. 308 U.S. at 284, 60 S.Ct. at 236 (footnotes omitted). The Court reasoned:

> Until the taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, . . ." A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

*Id.* at 284-85, 60 S.Ct. at 236 (footnotes omitted).

In arguing that the date of taking was the date of trial, Kirby maintains that *Danforth* only applies to takings under the Flood Control Act. Other circuits have not so limited *Danforth*, *see United States* v. *Gould*, 112 U.S.App.D.C. 233, 301 F.2d 557 (1962); *United States* v. *Mahowald*, 209 F.2d 751 (8th Cir.1954); *United States* v. *Johns*, 146 F.2d 92 (9th Cir.1944); and we do not believe such a limitation is appropriate. While the Court specifically discussed a taking under the Flood Control Act, the broad language of the case, as well as its reasoning, is equally applicable here. The Court in *Danforth* adopted the date of payment as the time of taking specifically because the Flood Control Act did not prescribe a statutory date, as is the case under 40 U.S.C. § 257. The Supreme Court held in *Danforth* that a taking did not occur until payment was made where the government proceeded by a petition for condemnation, because title did not pass to the government until the landowner had received compensation. Contrary to the statement made by a district court in another case involving the Big Thicket National Preserve, *United States* v. *59.29 Acres of Land*, 495 F.Supp. 212, 215 (E.D.Tex.1960)(awarding interest from the date of the filing of the commission's report), the government's commitment to the project does not ripen from "conjecture" to "certainty," at the time of the hearing. *Danforth* holds that a taking does not occur until payment is made, because the government may back out of the project up until the date of payment. Just as in *Danforth*, the government could have decided not to acquire Kirby's and Mabry's lands until it had paid for them and obtained title. Further, as in *Danforth*, the government has not yet appropriated the landowners' property to the uses of the government. In fact, Danforth had suffered more injury than the landowners here, since his land had already been flooded as a result of the government's flood control operations.

Kirby's next contention is that *Danforth* does not apply because the parties stipulated that the date of trial was the date

of taking. The government maintains that this stipulation was entered into solely for the purpose of establishing a valuation date. Our review of the proceedings indicates that this was in fact the case. As the Eighth Circuit noted in *Mahowald*, 209 F.2d at 754, the stipulation did not deprive the owners of the enjoyment of their lands, nor did it give the government any interest in those lands. The stipulation did no more than establish a date from which the value of the property could be determined.

The landowners maintain that it would be unjust to deny them interest where the valuation date is different from the date of payment, because the value of their property may have risen in the interim. The fifth amendment requires compensation for the value of the property on the date of taking. *United States* v. *Reynolds*, 397 U.S. 14, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970). The landowners contend that interest is a convenient method of assuring adequate compensation where property values may have risen during the delay between the valuation date and payment. *See Fibreboard Paper Products Corp.* v. *United States*, 355 F.2d 752 (9th Cir.1966) (awarding interest for the delay between the time of taking and payment). The landowners have made no showing that property values have in fact risen, and we see no reason to award interest on the basis of speculation about rising property values.

Finally, the landowners urge us to follow the Ninth Circuit's decision in *United States* v. *156.81 Acres of Land*, 671 F.2d 336 (9th Cir.), *cert. denied*. ..... U.S. ....., 103 S.Ct. 569, 74 L.Ed.2d ..... (1982). The Ninth Circuit held in *156.81 Acres of Land* that interest should accrue from the date of judgment until the date of payment where the condemned property was unimproved. The court reasoned:

> In cases like this one involving vacant, unimproved land, a condemnation judgment forces the landowner to hold property which generates liabilities but no benefits, perhaps

> excepting recreational benefits not present here. Absent recreational benefits, the judgment effectively takes the condemnee's land by denying any economically viable use. No one would buy land which the government could take at an already settled price. No landowner would build on land which the government could take for the price of the land before it had been improved. Where the property is income-producing, the condemnation judgment is not a taking, because it does not render the property economically nonviable.

671 F.2d at 339 — 40 (citations omitted). We are unpersuaded by the Ninth Circuit's distinction between improved and unimproved property. Whether or not the property is improved, the judgment in condemnation does not deprive the landowner of a present use. The rented property continues to provide rent; the wilderness property continues to provide recreational uses.

The Ninth Circuit noted further that "[m]aking the date of judgment the date of taking in this situation encourages the government to act promptly once a judgment is issued, since interest begins to accrue at that time." 671 F.2d at 340. The Ninth Circuit viewed the judgment as a finalization of the proceedings, in that it informs the government of the cost of acquiring the property so as to enable it to determine whether it can afford the acquisition and it further limits the landowner's ability to dispose of his property. *See also United States* v. *59.29 Acres of Land, supra.* We need not decide today whether there might be circumstances under which the delay between judgment and payment would warrant an award of interest as part of the award of just compensation. The dates of judgment and payment in these cases were relatively contemporaneous and, as mentioned above, there is no evidence in these cases of a rise in value for the properties between the two dates, which might make the earlier valuation date unjust. In Mabry's case, payment was made two weeks after the amended judgment was

entered, and in Kirby's it was made eight months after judgment.[3]

We hold, on the authority of *Danforth, supra*, that under the circumstances of this case, where (1) the government has proceeded by the straight condemnation method, and (2) the government has not entered into actual possession or substantially interfered with the landowners' rights in their property prior to payment, the date of taking is the date of payment. It is on this date that title actually passes to the government. Therefore, there was no interest due as part of the award of just compensation to the landowners.

## III. THE SUFFICIENCY OF THE COMMISSION'S FINDINGS.

Both parties in the Kirby case have challenged the sufficiency of the commission's report and findings. The district court accepted the commission's report and recommendations, ruling that the commission's findings were not clearly erroneous.

While the clearly erroneous standard of review applies to the commission's findings, Fed.R.Civ.P. 71A, conclusory findings alone are not sufficient. *United States* v. *Merz*, 376 U.S. 192, 198, 84 S.Ct. 639, 643, 11 L.Ed.2d 629 (1964). The Supreme Court stated in *Merz* that "conclusory findings as made in these cases are normally not reviewable by that standard, even when the district court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence." *Id.* In *United States* v. *Trout*, 386 F.2d 216, 224 (5th Cir. 1967), we held that *Merz* required the commission to give reasons for its conclusions to enable the reviewing court to determine the reasoning process underlying the commission's decision. More recently, we held that "[t]he paths

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[3] There was a three year delay between the trial and payment in Kirby's case. This delay, however, was not attributable solely to the government. The commission took a year to file its report and then both parties filed objections to the commission's findings.

followed by the commission in reaching the amount of the award shall be distinctly marked, . . . if not blazed with an array of findings of subsidiary facts that demonstrate that the ultimate finding is soundly and legally based." *Georgia Power Co. v. 138.80 Acres of Land*, 596 F.2d 644, 649 (5th Cir. 1979), *vacated and remanded on other grounds*, 617 F.2d 1112 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1403, 67 L.Ed.2d 372 (1981) (citation omitted).

We agree with the parties in this case that the commission's report is inadequate and that the case must be remanded for further findings. The parties have cited numerous examples where the report could use further elaboration. For example, the government points out that there is no acreage breakdown for the various uses of the property, although some of the uses are incompatible. Further, the report inadequately discusses the testimony of the landowner's appraiser, Willard Hall. The United States moved to strike that testimony, on the ground that Hall had failed to reduce his valuation testimony to reflect what Kirby conceded to be an error in the computation of timber value. The government claimed a number of other errors in Hall's valuation of the timber, as well as in his estimate of highest and best use. Kirby also asserts inadequacies in the report and contends further that the commission should have added on value for the unique nature of the property.

The parties have asked us to rule on a number of the issues that were not addressed adequately below, specifically whether Hall's testimony should have been stricken and whether the commission should have considered the unique qualities of the property. We decline to give what would be in effect an advisory opinion. Rather, we remand the case to the district court for a determination of the various issues raised by the parties, with instructions to follow the guidelines established by *Merz* and its progeny.

## IV. CONCLUSION.

We hold (1) that the landowners were not entitled to interest as part of the award of just compensation; and (2) that the commission's report in the Kirby case was inadequate and the case should be remanded for further proceedings consistent with this opinion.

REVERSED in part and REMANDED.

JOLLY, Circuit Judge, concurring in part and dissenting in part:

Judge Randall has written her usual fine opinion.

Quite aside from the quality of her opinion, however, because of the different way I look at this case, I can concur only with that part of the majority's opinion which holds that the commission's report in the Kirby case was inadequate and remands that case for further proceedings. *Merz* requires this result where the commission's report fails to follow certain guidelines. However, I strongly suspect that the result will not be much different than the one we are here presented and as a practical matter compliance with this remand will be a waste of time and money. Our remanding this case will, for sure, do nothing to assure those who worry about the various burdens of protracted litigation; but it was brought on, indeed required, by the inadequate work product of the commission.

I, cannot, however, concur in that part of the majority's opinion which holds that the property owners were not entitled to interest from the date of judgment as part of the award of just compensation. The majority has decided that when the government proceeds under the general condemnation statute, 40 U.S.C. § 257, that no distinction can be made, for purposes of determining when a taking occurs, between unimproved property and improved property. Such a decision does not take into proper account the marked difference in the effect of a condemnation judgment on an owner of unimproved property and,

in my opinion, denies him the just compensation to which he is entitled, Therefore, I dissent.

In the case of improved property, the condemnation judgment is not a taking, because the property continues to provide economic benefits to the property owner. *United States* v. *Mahowald*, 209 F.2d 751, 754 (8th Cir.1954). In the case of unimproved property, however, once a condemnation judgment is entered, the owner is, at least at that point if not before, shackled from making economically viable use of his property. As a practical matter, he cannot sell his land or make improvements upon it. Naturally, a landowner will not improve or build on property which the government could take for the price of land before it had been improved. Of course, no one is going to buy land which the government could take at an already settled price.

There is usually no need for the government to delay for months in deciding whether it wishes to buy unimproved property once a price has been established. It is, at a minimum, a terrible inconvenience to the property owner to be left thus suspended. By awarding interest from the date of the judgment, it seems to me that we would encourage the government to act as promptly as the circumstances may permit. At the very least, just compensation will be awarded to the owner who has remained liable for all expenses relating to the property, but who has received no income from it and has been prevented, for all practical purposes, from developing or disposing of it.

I find nothing in *Danforth* v. *United States*, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 (1939), which would require us to hold that the taking occurred at the time of payment. *Danforth* expressly excepted cases where a taking has occurred before the condemnor pays the property owner, and in my thinking a "taking" has occurred for all practical purposes in this type of case once the judgment has been entered, if not before. In addition, there is no *per se* rule that no taking occurs until money changes

hand or title passes. *United States* v. *Dow*, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958).

It is obvious, therefore, that I am more in agreement with the decision of the Ninth Circuit in *United States* v. *156.81 Acres of Land*, 671 F.2d 336(9th Cir.1982), *cert. denied*, .....U.S. ....., 103 S. Ct. 569, 74 L.Ed.2d .....(1982), than with the majority in our case. I would hold that in condemnation cases involving vacant, unimproved land, condemnees are entitled to interest from at least the date of judgment if there is no act on the part of the government occurring before judgment which constitutes a taking.

**UNITED STATES of America**

**v.**

**2,175.86 ACRES OF LAND, MORE OR LESS, SITUATED IN HARDIN AND JEFFERSON COUNTIES, STATE OF TEXAS, and Kirby Forest Industries, Inc., et al., and Unknown Heirs.**

**Civ. A. No. B-78-598-CA.**

United States District Court,
E. D. Texas,
Beaumont Division.

July 27, 1981.

## MEMORANDUM OPINION

ROBERT M. PARKER, District Judge.

This is a land condemnation case. According to the Report and Findings filed March 3, 1980, the Land Condemnation Commission found that the "highest and best" use is varied as portions of the land are best used for rural subdivision, waterfront housing and recreational use, timber growing and sand pit operations. The Commission found that the 2,175.86 acres of land subject to condemnation has a value of $2,331,202.00. Objections to the Commission's Report were filed by both the government and Defendant Kirby Forest Industries (K.F.I.). Pursuant to Rule 53(e)(2) and Rule 71A of the Federal Rules of Civil Procedure, the Court held a hearing to consider the Commission's Report and the objections made thereto.

The scope of review is limited. "The Court, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions"; however, "in an action to be tried without a jury, the Court shall accept the master's findings of fact unless clearly erroneous." Fed.R.Civ.P. 53(e)(2) & 71A(h); *United States* v. *Merz*, 376 U.S. 192, 198, 84 S.Ct. 639, 643, 11 L.Ed.2d 629 (1964); *Livas* v. *Teledyne Movible Offshore, Inc.*, 607 F.2d 118, 119 (5th Cir. 1979). The findings of the Commission, to the

extent that the Court adopts them, shall be considered as the findings of the Court. Fed.R.Civ.P. 52(a) & 71A(h). It is the opinion of the Court that the findings of the Commission are sufficient and are reviewable by the "clearly erroneous" standard prescribed by the Federal Rules of Civil Procedure and in accordance with *United States* v. *Merz, supra.* Upon review of the Commission's Report and Findings and the objections thereto, the Court finds that the Commission's findings are not clearly erroneous as asserted by the parties, adopts such findings as its own, and overrules the objections of the parties except as to the issue of pre-judgment interest which was not discussed in the Report and Findings of the Land Condemnation Commission.

*CONDEMNATION PROCEEDINGS GENERALLY:*

The government employs two general types of condemnation proceedings: 1) declaration of taking and 2) straight condemnation. Under the Declaration of Taking Act, 40 U.S.C. §§ 258a-258e, a taking occurs and the government obtains title to the land immediately upon filing a declaration of taking and depositing into the court the estimated amount of just compensation. If just compensation, as judicially determined, is found to be greater than the deposit, the statute requires the government to deposit the difference with interest from the date of taking. The deposit of an amount estimated to be just compensation relieves the government of the burden of paying interest on that amount. *United States* v. *Dow,* 357 U.S. 17, 23, 78 S.Ct. 1039, 1045, 2 L.Ed.2d 1109 (1958).

Should the government proceed with a straight condemnation proceeding as in the instant case, a complaint in condemnation will be filed pursuant to 40 U.S.C. § 257 and Federal Rule of Civil Procedure 71A. Where that method is utilized, the landowner retains possession and use of the land until after a trial and the payment of the award. Unless a taking has previously occurred, title does not pass and the taking does not occur until the award is paid; consequently, no interest is due upon the

award. *Danforth* v. *United States*, 308 U.S. 271, 284-85, 60 S.Ct. 231, 236, 84 L.Ed. 240 (1939).

*CONTENTIONS OF THE PARTIES:*

Defendant K.F.I. admits that no declaration of taking was filed, however, K.F.I. contends that it is entitled to prejudgment interest because 1) the parties stipulated that the date of taking was March 6, 1979 and, therefore, prejudgment interest should be calculated from that date; and 2) just compensation requires that K.F.I. be compensated for all injury occasioned by the taking. K.F.I. claims that, despite the absence of a declaration of taking, K.F.I. has been deprived of the enjoyment of any benefits of ownership and has borne all the burdens of ownership, including taxation, from the inception of these proceedings until the present. K.F.I. argues that no purchaser would, on or after March 6, 1979, pay value with the prospect only of having to defend a condemnation suit, running its hazards and incurring its costs.

The government responds that, though the Commission's Report and Findings states that March 6, 1979 is stipulated as the date of taking, the Commission considered the terms "date of valuation" and the "date of taking" interchangeable. The government further responds that the United States exercised no control, dominion or possession of the property in question and, in fact, K.F.I. has been and is still in possession of such property. The government reminds the Court of Instruction 19 to the Commission entered on October 3, 1977, stating that the "date of taking" must be and is fixed as of the date the government took posession of the land and denied the landowner its use and benefit. However, the question remains as to whether the government has constructively possessed the land or effectively denied the landowner the use and benefit of the land so as to constitute a taking and to entitle K.F.I. to prejudgment interest.

*PREJUDGMENT INTEREST:*

The Fifth Amendment to the United States Constitution recognizes the authority of the government to appropriate private property for public use; however, it is specified that such property shall not be taken for public use without just compensation. Due to Public Law 93–439, October 11, 1974, 16 U.S.C.A. § 698, establishing the Big Thicket National Preserve, there is no question but that the land involved in this case is being taken for public use and that just compensation must be awarded to Defendant K.F.I.

"Just compensation" is the fair market value at the time of the taking plus interest from that date to the date of payment. *Albrecht* v. *United States,* 329 U.S. 599, 67 S.Ct. 606, 91 L.Ed. 532 (1946). To the extent that interest is an element of just compensation, eminent domain cases are an exception to the general rule of nonliability of the sovereign for interest. This award of interest is not mere payment for delay, *Bishop* v. *United States,* 288 F.2d 525 (5th Cir. 1961); nor is it interest as it is commonly known, but rather a part of the just compensation to which the owner is entitled. *United States* v. *Thayer West Point Hotel Co.,* 329 U.S. 585, 67 S.Ct. 398, 91 L.Ed. 521 (1947); *Shoshone Tribe* v. *United States,* 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937). Thus, in defining just compensation, it is more accurate to say that where the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of taking as will produce the full equivalent of such value paid contemporaneously. *United States* v. *Klamath & Moadoc Tribes of Indians,* 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219 (1938); *United States* v. *Playa de Flor Land & Improvement Co.,* 160 F.2d 131 (5th Cir. 1947). *United States* v. *5.00 Acres of Land,* 507 F.Supp. 589, 598 (E.D.Tex.1981).

Where private property is appropriated, the right to interest or the fair equivalent attaches automatically to the right to an

award of damages. *Miller* v. *United States*, 620 F.2d 812 (Ct.Cl.1980); *Shoshone Tribe* v. *United States*, *supra*. No specific demand to include interest is necessary, nor does an award of interest depend on the existence of a specific statutory provision or a special agreement of the parties. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 306, 43 S.Ct. 354, 356, 67 L.Ed. 664 (1923). It is clear from the case law that where the date of taking of the property precedes the date of payment of the award, the right to interest is directly derived from the Fifth Amendment. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738 (1951); *Bishop* v. *United States*, *supra*; *United States* v. *59.29 Acres of Land*, 495 F. Supp. 212, 214 (E.D.Tex.1980).

The purpose of awarding just compensation is to put the owner in as good a position pecuniarily as if the use of the owner's property had not been taken. *Phelps* v. *United States*, 274 U.S. 341, 344, 47 S.Ct. 611, 612, 71 L.Ed. 1083 (1927). This purpose is procedurally accomplished in a "declaration of taking" proceeding by filing a declaration of taking and depositing into the court the estimated amount of just compensation in accordance with the Declaration of Taking Act, 40 U.S.C. §§ 258a–258e. Such act allows 6% interest on the final award from the date of taking to the date of payment, but no interest on the amount previously deposited into the court. This provision minimizes the interest burden of the government in a condemnation proceeding and alleviates the hardship to the landowner and the occupant from immediate taking. *U.S.* v. *Miller*, 317 U.S. 369, 381, 63 S.Ct. 276, 283, 87 L.Ed. 336 (1943). However, where, as in the instant case, the government proceeds by "straight" condemnation, no deposit is required, the government's interest burden is not minimized, and the hardship to the land owner is not alleviated.

Though Federal Rule of Civil Procedure 71A governs the procedural aspects of this case, the rule does little to enlighten

the Court as to the award of interest. It seems to be well-settled in the case law, however, that interest is generally allowed as part of the damages, or just compensation, to which the owner is entitled when property is taken under the power of eminent domain. *Seaboard Air Line Ry. Co.* v. *United States, supra.* It seems just as clear from the case law that such interest is computed from the date of taking. *Albrecht* v. *United States, supra,* 329 U.S. at 602, 67 S.Ct. at 608. However, the date of taking in condemnation suits for the purpose of computing the interest due on the award has been variously determined as (1) the date of filing a declaration of taking; (2) the date of vesting of title; (3) the date of issuance of the summons; (4) the date of filing the oath of appraises; (5) the date of injury to the property; (6) the date of taking actual possession of the property; (7) the date of filing the condemnation commission's report; (8) the date an assessment list was filed; (9) the date a report on damages was filed; (10) the date of making demand for payment; (11) the date of confirmation of the commission's award; and other dates. *United States* v. *59.29 Acres of Land, supra,* at 214.

Despite the general rule of federal case law that interest is assessed from the date of taking, the Supreme Court has held that the federal courts should "adopt the local rule if it is a fair one." *Brown* v. *United States,* 263 U.S. 78, 87, 44 S.Ct. 92, 95, 68 L.Ed. 171 (1923). In *Brown,* the Court applied the local rule of Idaho and assessed interest from the date of the summons. A review of Texas case law reveals diverse results. In *Texarkana & F. S. Ry. Co.* v. *Brinkman,* 292 S.W. 860 (Tex.Comm'n.App. 1927), interest was computed from the date that the Special Commissioners awarded or estimated the damages. Explaining that *Brinkman* was never adopted by the Texas Supreme Court, the court in *Harris County Flood Control District* v. *King,* 221 S.W.2d 361 (Tex.Civ.App.—Galveston 1949, writ dism'd), allowed 6% interest from the date that condemnation proceedings were instituted subject to allowing the condemnor the

opportunity to prove affirmatively the value of the use of the property to the owner from such date until the condemnor gets actual possession. Though *Brinkman* and *King* have not been overruled, Texas courts have subsequently held that interest begins to accrue on the date of possession of the land by the condemnor. *Trinity River Authority of Texas* v. *Sealy & Smith Foundation*, 435, S.W.2d 864, 865 (Tex.Civ.App.—Beaumont 1968, writ ref'd); *Housing Authority of the City of Dallas* v. *Dixon*, 250 S.W.2d 636, 637 (Tex.Civ.App.—Dallas 1952, writ ref. n.r.e.).

In *United States* v. *59.29 Acres of Land*, *supra*, the "taking" question was confronted in a case which also involved land within the "Big Thicket". Despite the "date of taking" stipulation by the parties, the Court held that interest accrued from the date of the filing of the report and findings of the commission. The Court noted that under the ruling of *Gerlach Livestock Co.* v. *United States*, 76 F.Supp. 87, 97 (Ct.Cl.1948), affirmed, 339 U.S. 725, 70 S.Ct 955, 94 L.Ed. 1231 (1950), which held that the date of taking of the property "comes whenever the [plaintiff's] intent to take has been definitely asserted and it begins to carry out that intent", the taking may be said to have occurred by the date of the hearing before the condemnation commission. The Court explained:

> . . . by that time the plaintiff has definitely asserted its intent to take the property and has taken all the steps required for the taking [under Fed.R.Civ.Pro. 71A] except for payment of the award. By that date, the plaintiff is no longer able to dismiss the suit at will.

*United States* v. *59.29 Acres of Land*, supra, at 215. However, out of "fairness to the Plaintiff," the Court instead set the "date of the beginning of the obligation to pay interest on the award as the date of the filing of the report and findings of the commission, rather than the date of the hearing, since at the earlier date the amount of the award cannot be known by the plaintiff [and]

such amount can be known for a certainty only when the commission files its report and findings with the Court."

Although no precise rule determined when property has been taken, the question necessarily requires a weighing of private and public interests. *Agins* v. *City of Tiburon*, 447, U.S. 255, 260–61, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *United States* v. *59.29 Acres of Land, supra*, at 214. The Court should keep in mind that the Fifth Amendment's guarantee is designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed. 631 (1978). The constitutional requirement of just compensation derives as much content from the basic equitable pinciples of fairness as it does from technical concepts of property law. *United States* v. *Fuller*, 409 U.S. 488, 490, 93 S.Ct. 801, 803, 35 L.Ed.2d 16 (1973); *U. S.* v. *59.29 Acres of Land, supra*. It is for this reason that the concept of "inverse" condemnation or "de facto" taking has evolved. Inverse condemnation actions fall into two broad categories: (1) those alleging that particular government-imposed land use regulations are unduly restrictive. *See, e. g., Agins* v. *City of Tiburon, supra*, and (2) those claiming that certain government activities substantially interfere with the use and enjoyment of property. *See, e. g., Griggs* v. *Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962).

In determining whether a taking has been made out, several factors are considered, including the economic impact of the regulation on the claimant, the extent to which the regulation or government activity has interfered with distinct investment backed expectations, the character of the governmental action and the nature and the extent of the interference with rights in the parcel as a whole. *Pennsylvania Central Transportation Co.* v. *New York City, supra*, 438 U.S. at 124 & 130, 98 S.Ct. at

2659 & 2662. Although, diminution in property value, standing alone, does not establish a taking, *see Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Hadacheck* v. *Sebastion*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915), a government regulation effects a taking if the ordinance "does not substantially advance legitimate interests or denies an owner economically viable use of his land." *Agins* v. *Tiburon, supra*, 447 U.S. at 260, 100 S.Ct. at 2151. Furthermore, if the effects of governmental action are so complete as to deprive the owner of all or most of his interest in the subject matter, a taking has occurred. *United States* v. *General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945); *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914). Simply stated, property is legally taken when the condemnor's action directly interferes with or substantially disturbs the owner's use and enjoyment of his property. *Pete* v. *United States*, 531 F.2d 1018 (Ct.Cl.1976). The Uniform Eminent Domain Code §1009 states that "the compensation awarded must include an amount sufficient to compensate for loss caused by the restriction or limitation imposed by the court upon the owner's right to use the property."

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414–15, 43 S.Ct. 158, 159–160, 67 L.Ed. 322 (1922), the court found that a statute made it commercially impracticable to mine coal and, thus, had nearly the same effect as the complete destruction or rights the claimant had reserved from the owners of the surface land. In *United States* v. *Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), government activity resulted in the destruction of the use of property as a commercial chicken farm. Finding that the loss to the owner was "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it," the Court held that a taking had occurred. *Id.* at 261, 66 S.Ct. at 1065.

In the instant case, condemnation proceedings instituted by the United States government have effectively denied Defendant K.F.I. economically viable use and enjoyment of its property since it is prevented from continuing its timber buisness. It is highly doubtful that the government would permit the cutting of even one tree when the purpose of these proceedings is to preserve the land in question for public use as a wilderness park. It is unjust that the government enjoys the interest to which the owner is entitled while the owner is effectively denied the use and enjoyment of his property. Surely this is not the intent of the Fifth Amendment.

In today's inflated economic climate, interest is a realistic expectation of the owner. The Court takes judicial notice that the current legal rate of interest in the state of Texas is six percent (6%) per annum. Tex.Rev.Civ.Stat.Ann. art. 5069–1.03 (Vernon Supp. 1979); *See State of Texas* v. *Brunson*, 461 S.W.2d 681 (Tex.Civ.App.—Corpus Christi 1970, writ ref. n.r.e.). In addition to the value of the land, found by the Commission to be $2,331,202.00, interest is assessed on such amount at the legal rate of six percent (6%) per annum from the date that condemnation proceedings were instituted.

The Court notes that, had the government instituted proceedings pursuant to the Declaration of Taking Act, 40 U.S.C. §§ 258a–258e, interest would be assessed at the same rate from the date that the declaration of taking was filed. Furthermore, the amount of interest assessed from the date that proceedings were instituted is but a fraction of the amount that the government would have paid had it borrowed money on the money market in order to deposit the estimated amount of just compensation at the date of taking. The amount is also only a fraction of the benefits that the owner could have received had the money been available to him for investment purposes. With these considerations, the result in the instant case appears to be an equitable solution.

The Court recognizes that the amount of the condemnation award is not known with certainty by the plaintiff until the date that the report and findings of the Commission are filed; however, a plaintiff can minimize its interest burden by depositing estimated funds into the registry of the Court at the initiation of condemnation proceedings. In the instant case, the government chose not to take such precautions. The law has little sympathy for those who do not avail themselves of protective insurance, especially when such persons are enjoying the money of others in the meantime. Short and sweet, the government cannot "have its cake and eat it too."

EXHIBIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 81-2402

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UNITED STATES OF AMERICA,

Plaintiff-Appellant
Cross-Appellee,

versus

2,175.86 ACRES OF LAND, More or Less, Situated in Hardin & Jefferson Counties, State of Texas, ET AL.,

Defendants,

KIRBY FOREST INDUSTRIES, INC.,

Defendant-Appellee
Cross-Appellant.

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Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

( MARCH 10, 1983 )

Before RUBIN, RANDALL and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

Denied

ENTERED FOR THE COURT:

CLERK'S [illegible]

Charles Clark
United States Circuit Judge

1974 Act - Title 16 Sec. 698 - U.S. Code

§ 698. Big Thicket National Preserve--Establishment

(a) In order to assure the preservation, conservation, and protection of the natural, scenic, and recreational values of a significant portion of the Big Thicket area in the State of Texas and to provide for the enhancement and public enjoyment thereof, the Big Thicket National Preserve is hereby established.

Location; boundaries; publication in Federal Register

(b) The Big Thicket National Preserve (hereafter referred to as the "preserve") shall include the units generally depicted on the map entitled "Big Thicket National Preserve", dated November 1973 and numbered NBR-BT 91,027 which shall be on file and available for public inspection in the offices of the National Park Service, Department of the Interior, Washington, District of Columbia, and shall be filed with appropriate offices of Tyler, Hardin, Jasper, Polk, Liberty, Jefferson, and Orange Counties in the State of Texas. The Secretary of the Interior (hereafter referred to as the "Secretary") shall, as soon as practicable, but no later than six months after October 11, 1974, publish a detailed description of the boundaries of the preserve in the Federal Register. In establishing such boundaries, the Secretary shall locate stream corridor unit boundaries referenced from the stream bank on each side thereof and he shall further make every reasonable effort to exclude from the units hereafter described any improved year-round residential properties which he determines, in his discretion, are not necessary for the protection of the values of the area or for its proper administration. The preserve shall consist of the following units:

Big Sandy Creek unit, Polk County, Texas, comprising approximately fourteen thousand three hundred acres;

Menard Creek Corridor unit, Polk, Hardin, and Liberty Counties, Texas, including a module at its confluence with the Trinity River, comprising approximately three thousand three hundred and fifty-nine acres;

Hickory Creek Savannah unit, Tyler County, Texas, comprising approximately six hundred and sixty-eight acres;

Turkey Creek unit, Tyler and Hardin Counties, Texas, comprising approximately seven thousand eight hundred acres;

Beech Creek unit, Tyler County, Texas, comprising approximately four thousand eight hundred and fifty-six acres;

Upper Neches River corridor unit, Jasper, Tyler, and Hardin Counties, Texas, including the Sally Withers Addition, comprising approximately three thousand seven hundred and seventy-five acres;

Neches Bottom and Jack Gore Baygall unit, Hardin and Jasper Counties, Texas, comprising approximately thirteen thousand three hundred acres;

Lower Neches River corridor unit, Hardin, Jasper, and Orange Counties, Texas, except for a one-mile segment on the east side of the river including the site of the papermill near Evadale, comprising approximately two thousand six hundred acres;

Beaumont unit, Orange, Hardin, and Jefferson Counties, Texas, comprising approximately six thousand two hundred and eighteen acres;

Loblolly unit, Liberty County, Texas, comprising approximately five hundred and fifty acres;

Little Pine Island-Pine Island Bayou corridor unit, Hardin and Jefferson Counties, Texas, comprising approximately two thousand one hundred acres; and

Lance Rosier Unit, Hardin County, Texas, comprising approximately twenty-five thousand and twenty-four acres.

Acquisition of Land

(c) The Secretary is authorized to acquire by donation, purchase with donated or appropriated funds, transfer from any other Federal agency, or exchange, any lands, waters, or interests therein which are located within the boundaries of the preserve: Provided, That any lands owned or acquired by the State of Texas, or any of its political subdivisions, may be acquired by donation

only. After notifying the Commitees on Interior and Insular Affairs of the United States Congress, in writing, of his intention to do so and of the reasons therefor, the Secretary may, if he finds that such lands would make a significant contribution to the purposes for which the preserve was created, accept title to any lands, or interests in lands, located outside of the boundaries of the preserve which the State of Texas or its political subdivisons may acquire and offer to donate to the United States or which any private person, organization or public or private corporation may offer to donate to the United States and he may administer such lands as a part of the preserve after publishing notice to that effect in the Federal Register. Notwithstanding any other provision of law, any federally owned lands within the preserve shall, with the concurrence of the head of the administering agency, be transferred to the administrative jurisdiction of the Secretary for the purposes of sections 698 to 698e of this title, without transfer of funds.

Pub.L. 93-439, § 1, Oct. 11, 1974, 88 Stat. 1254.

§ 698a. Same--Mineral rights; easements; improved properties

(a) The Secretary shall, immediately after the publication of the boundaries of the preserve, commence negotiations for the acquisition of the lands located therein: Provided, That he shall not acquire the mineral estate in any property or existing easements for public utilities, pipelines or railroads without the consent of the owner unless, in his judgment, he first determines that such property or estate is subject to, or threatened with, uses which are, or would be, detrimental to the purposes and objectives of sections 698 to 698e of this title: Provided further, That the Secretary, insofar as is reasonably possible, may avoid the acquisition of improved properties, as defined in sections 698 to 698e of this title, and shall make every effort to minimize the acquisition of land where he finds it necessary to acquire properties containing improvements.

Plan to Committee on Interior and Insular Affairs and on Appropriations; time; contents

(b) Within one year after October 11, 1974, the Secretary shall submit, in writing, to the Committee on Interior and Insular Affairs and to the Committees on Appropriations of the United States Congress a detailed plan which shall indicate:

(i) the lands and areas which he deems essential to the protection and public enjoyment of this preserve,

(ii) the lands which he has previously acquired by purchase, donation, exchange or transfer for administration for the purpose of this preserve, and

(iii) the annual acquisition program (including the level of funding) which he recommends for the ensuing five fiscal years.

Completion of land acquisition program; time

(c) It is the express intent of the Congress tHat the Secretary should substantially complete the land acquisition program contemplated by sections 698 to 698e of this title within six years after October 11, 1974.

Pub.L. 93-439, § 2, Oct. 11, 1974, 88 Stat. 1256.

§ 698b. Same--Improved property; election of right of use and occupancy; payment of fair market value; termination of right

(a) The owner of an improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for himself and his heirs and assigns a right of use and occupancy of the improved property for non-commercial residential purposes for a definite term of not more than twenty-five years or, in lieu thereof, for a term ending at the death of the owner or the death of his spouse, whichever is later. The owner shall elect the term to be reserved. Unless this property is wholly or partially donated to the United States, the Secretary shall pay the owner the fair market value oi the property on the date of acquisition less the fair market value, on that date, of the right retained by the owner. A right retained purusant to this section shall be subject to termination by the Secretary upon his determination that it is being exercised in a manner inconsistent with the purposes of sections 698 to 698e of this title, and it shall terminate by operation of law upon the Secretary's notifying the holder of the right of sucH determination and tendering to him an amount equal to the fair market value of that portion of the right which remains unexpired.

Definitions

(b) As used in sections 698 to 698e of this title, the term "improved property" means a detached, year-round one-family dwelling which serves as the owner's permanent

place of abode at the time of acquisition, and construction of which was begun before July 1, 1973, which is used for non-commercial residential purposes, together with not to exceed three acres of land on which the dwelling is situated and together with such additional lands or interests therein as the Secretary deems to be reasonably necessary for access thereto, such lands being in the same ownership as the dwelling, together with any structures accessory to the dwelling which are situated on such land.

Waiver of right to relocation assistance by election of right of use and occupancy

(c) Whenever an Owner of property elects to retain a right of use and occupancy as provided in this section, such owner shall be deemed to have waived any benefits or rights accruing under sections 4623, 4624, 4625, and 4626 of Title 42, and for the purposes of such sections such owner shall not be considered a displaced person as defined in section 4601(6) of Title 42.

Pub.L. 93-439, § 3, Oct. 11, 1974, 88 Stat. 1256, amended Pub.L. 94-578, Title III, § 322, Oct. 21, 1976, 90 Stat. 2742.

§ 698c. Same--Administration; applicability of other laws

(a) The area within the boudaries depicted on the map referred to in section 698 of this title shall be known as the Big Thicket National Preserve. Such lands shall be administered by the Secretary as a unit of the National Park System in a manner which will assure their natural and ecological integrity in perpetuity in accordance with the provisions of sections 698 to 698e of this title and with the provisions of sections 1 and 2 to 4 of this title, as amended and supplemented.

Limitation on construction of roads, campgrounds, etc.; rules and regulations for use of Federal lands and waters

(b) In the interest of maintaining the ecological integrity of the preserve, the Secretary shall limit the construction of roads, vehicular campgrounds, employee housing, and other public use and administrative facilities and he shall promulgate and publish such rules and regulations in the Federal Register as he deems necessary and appropriate to limit and control the use of, and activities on, Federal lands and waters with respect to:

(1) motarized land and water vehicles;

(2) exploration for, and extraction of, oil, gas, and other minerals;

(3) new construction of any kind;

(4) grazing and agriculture; and

(5) such other uses as the Secretary determines must be limited or controlled in order to carryout the purposes of sections 698 to 698e of this title.

(c) The Secretary shall permit hunting, fishing, and trapping on lands and waters under his jurisdiction within the preserve in accordance with the applicable laws of the United States and the State of Texas, except that he may designate zones where and periods when, no hunting, fishing, trapping, or entry may be permitted for reasons of public safety, administration, floral and faunal protection and management, or public use and enjoyment. Except in emergencies, any regulations prescribing such restrictions relating to hunting, fishing, or trapping shall be put into effect only after consultation with the appropriate State agency having jurisdiction over hunting, fishing, and trapping activities.

Pub.L. 93-439, § 4, Oct. 11, 1974, 88 Stat. 1257.

§ 698d. Same preservation as wilderness; review of area by Secretary; report to President; time

Within five years from October 11, 1974, the Secretary shall review thearea within the preserve and shall report to the President, in accordance with section 1132(c) and (d) of this title, his recommendations as to the suitability or nonsuitability of any area within the preserve for preservation as wilderness, and any designation of any such areas as a wilderness shall be accomplished in accordance with section 1132(c) and (d) of this title.

Pub.L. 93-439, § 5, Oct. 11, 1974, 88 Stat. 1257.

§ 698e. Same; authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 698 to 698e of this title, but not to exceed $63,812,000 for the acquisition of lands and interests in lands and not to exceed $7,000,000 for development.

Pub.L. 93-439, §6, Oct. 11, 1974, 88 Stat. 1257.

Legislative History. For legislative 1974 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 93-439, see 5554.

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. —

UNITED STATES OF AMERICA, PETITIONER

*v.*

156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 671 F.2d 336. The opinions of the district court (App. C and D, *infra*, 15a-19a) are unreported.

The judgment of the court of appeals was entered on March 12, 1982, and rehearing was denied on June 1, 1982 (App. B, *infra*, 13a-14a). On August

18, 1982, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

40 U.S.C. 257 provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

40 U.S.C. 258a provides in pertinent part:

> In any proceeding in any court of the United States * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States.
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> * * * * *
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> Upon the filing said declaration of taking and of the deposit in the court, to the use of the per-

sons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

**STATEMENT**

1. Two types of condemnation are provided for by statute: under the Declaration of Taking Act, 40 U.S.C. 258a, the government may obtain title and possession immediately by filing a declaration of taking and depositing with the court the estimated amount of just compensation. If the judicially determined amount of just compensation is greater than the amount deposited, the government must pay the difference with interest from the date the declaration of taking is filed; no interest is due on the amount originally deposited. The alternative condemnation method, "straight condemnation," is initiated by filing a complaint in condemnation pursuant to 40 U.S.C. 257. The government makes no deposit with the court, and the landowner retains possession and title until the judicial proceedings have been completed and the government has paid the judgment awarded.

This case raises the question of when interest begins to accrue in a straight condemnation case.

2. On July 12, 1976, the United States filed a complaint pursuant to 40 U.S.C. 257 to condemn property located in Marin County, California, for inclusion in the Golden Gate National Recreation Area.[1] Beginning on June 20, 1977, a jury trial was held to determine the amount of just compensation to be paid for the interest condemned by the United States. On July 14, 1977, the jury reached a verdict of $3,799,400. On November 9, 1977, final judgment was entered in favor of the landowners in that amount.

On November 17, 1977, the United States moved for a new trial, or, in the alternative, for remittitur, followed by extensive briefing by the parties. The motion was denied by the district court on June 20, 1978, and, on August 11, 1978, the United States filed a notice of appeal; the landowners then cross-appealed. By stipulation of all parties, the appeals were withdrawn on October 30, 1978.

On November 17, 1978, the Assistant United States Attorney deposited the full amount of the award with the clerk of the court in satisfaction of the judgment. Ten days later, the government deposited an additional $239,802.90, representing interest at the rate of 6% on the judgment for the year between the entry of final judgment and the payment of that judgment. Distribution of the additional deposit was made subject to a further order of the court. On March 5, 1979, the United States filed

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[1] The Act of Oct. 27, 1972, Pub. L. No. 92-589, 86 Stat. 1299, 16 U.S.C. 460bb *et seq.*, established the Golden Gate National Recreation Area and authorized acquisition of lands within its boundaries by the Secretary of the Interior.

a motion for an order to disallow interest on the judgment.

3. On June 21, 1979, the district court granted the government's motion and issued an order disallowing interest on the judgment (App. C, *infra*, 15a-17a). Relying on the established principle that "interest is allowable only from the time of the 'taking' to the date of the payment of the award," see, e.g., *Danforth* v. *United States*, 308 U.S. 271 (1939), the court found that the United States had not exercised "control and dominion" over the land prior to payment of the judgment (App. C, *infra*, 17a). In its order denying the landowners' motion for reconsideration, the court found no support in the record for the landowners' claim that "the land had increased in value during the time that elapsed from the entry [of verdict] until the Government's taking" (App. D, *infra*, 19a).

4. The United States Court of Appeals for the Ninth Circuit reversed, Judge Wallace dissenting. The court held that interest running from the judgment date should be allowed. Recognizing that "[w]here the property is income-producing, the condemnation judgment is not a taking" (App. A, *infra*, 7a), the court distinguished this situation, where the land was undeveloped, and hence producing no current economic benefits for the owners. In that situation, the court reasoned, the existence of the judgment in condemnation produced a "cloud on the title" that precluded the development or sale of the land, and thus "denied the landowners any economically viable use of their land" (App. A, *infra*, 8a). Accordingly, the panel majority concluded that the date of taking of undeveloped land is the date of judgment, mandating the award of post-judgment interest (*ibid.*).

Judge Wallace dissented, relying on "the long-standing rule that absent a taking by physical possession or by statutory provision, no taking occurs until payment of the condemnation award." App. A, *infra*, 9a. He could see no reason for drawing a constitutional distinction between the owner of unimproved and improved property in these circumstances; both are in the same situation as owners whose ability to sell or develop their land is thwarted by publicly announced government plans to condemn property (App. A, *infra*, 11a). All alike suffer economic burdens that are significantly less than "the kinds of substantial deprivations which have heretofore been recognized as constitutional 'takings'" (App. A, *infra*, 11a-12a). Judge Wallace concluded that any change in the rules applicable to unimproved property should "come from Congress rather than the federal courts" (App. A, *infra*, 12a).

## REASONS FOR GRANTING THE PETITION

This case presents an important and recurring[2] question concerning the government's obligation to

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[2] The courts that have recently considered the issue have selected various points in the straight condemnation process for the beginning of the accrual of interest. The issue is currently pending in the Court of Appeals for the Fifth Circuit. *United States* v. *2,175.86 Acres of Land in Hardin and Jefferson Counties, Texas, & Kirby Forest Industries*, 5th Circuit No. 81-2402. The district court in *Kirby Forest Industries*, 520 F. Supp. 75 (E.D. Tex. 1981), awarded interest from the date the complaint was filed, some seven months before trial. See also *United States* v. *59.29 Acres of Land in Hardin County, Texas*, 495 F. Supp. 212 (E.D. Tex. 1980) (interest due from the date of the filing of the report and findings of the Commission appointed pursuant to Fed. R. Civ. P. 71A to determine just compensation); *United States* v. *Cer-*

pay interest in straight condemnation cases. The court of appeals' resolution of that question is inconsistent with this Court's decision in *Danforth* v. *United States*, 308 U.S. 271 (1939), and its more recent just compensation cases. In addition, it will be difficult for condemnation courts to apply, and will substantially increase condemnation costs while unfairly discriminating between owners of developed and undeveloped land. A landowner suffering injustices as a result of delays in the payment of a straight condemnation award has alternative remedies free from these disadvantages.

1. Although the potential financial impact on the government of the decision below cannot be predicted with any accuracy, it is bound to be large. As of September 1982, pending cases filed under 40 U.S.C. 257 involve more than 6,000 tracts of land, valued by the government at more than $100 million. The landowners' valuations are, of course, much higher. Most of these condemnations are for the use of the Park Service, and thus presumably involve unimproved land. Assuming that only half of the land involved is determined to be non-income producing, and that there is on the average only 6 months of interest awarded and only at 6% straight interest, the total extra interest obligation under the analysis of the court below would still be about one and a half million dollars for currently pending cases alone. The

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*tain Lands in Eastham, Truro, and Wellfleet, County of Barnstable, Commonwealth of Massachusetts*, Nos. 68-208C *et al.* (D. Mass. May 28, 1982) (same); *United States* v. *15.65 Acres of Land in the County of Marin, State of California*, Nos. 81-4062 & 81-4101 (9th Cir. May 25, 1982, rehearing denied, Sept. 10, 1982) (interest due from stipulated date of valuation, more than a year before trial).

actual figure would doubtless be substantially in excess of that estimate.

Congressional appropriations to finance these condemnations have been based on the long-standing assumption, recognized by the dissent below (App. A, *infra*, 9a), that in straight condemnation cases where the government has not entered into possession, the date of taking is the date that the government pays the condemnation award,[3] so that no interest is due. In carving out an exception to this general rule for non-income producing land, the court below imposed an unanticipated increase in the cost of acquiring such land, thereby reducing the agencies' abilities to implement congressional directives.

2. In *Danforth* v. *United States*, *supra*, 308 U.S. at 284, this Court concluded that "[u]nless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit * * * takes place upon the payment of the money award by the condemnor. No interest is due upon the award." (Footnote omitted). In concluding that there has "in actuality" been a previous taking when unimproved lands are involved,[4] the court below overlooked the

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[3] Cf. S. Rep. No. 1597, 90th Cong., 2d Sess. 5 (1968), directing the Park Service to utilize straight condemnation proceedings to preserve the option to reconsider, after judgment award fixes cost of acquisition. The option is important: "[t]he cost of public projects is a relevant element * * *, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost," *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 554 (1946).

[4] If the government were to enter into possession of the land before the payment of just compensation, that would effectuate a taking "in actuality", which would require that

analysis upon which the *Danforth* conclusion was based:

> The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. (Footnotes omitted.) *Ibid.*

The argument adopted by the court below that the land was taken when the condemnation judgment denied the landowners "any economically viable use" of their property (App. A, *infra*, 6a) is the same as the claim of the *Danforth* landowner that the government "took" a flowage easement in his farmland[5] either when Congress passed the Flood Control Act that authorized the condemnation or when the government built levees as part of the project, because these actions had, as a practical matter, reduced his ability to use or sell his land. This Court rejected that claim, holding that this reduction in the value of the land, like other changes in value that are incidents of ownership, "cannot be considered as a 'taking' in the constitutional sense" (308 U.S. at 285). There is no suggestion that the size of the change in

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interest be paid to compensate the landowner for the delay in payment. *United States* v. *Dow*, 357 U.S. 17, 24 (1958). In the instant case, however, the district court specifically found that the government had not exercised control and dominion over the land until after it deposited the amount of the verdict in the registry of the court (App. C, *infra*, 17a).

[5] See Brief for William H. Danforth, Petitioner, No. 309, 1939 Term at 4.

value, or a complete inability to sell the land, would have affected the Court's reasoning.[6]

This Court has recently reiterated the teaching of *Danforth*, in again rejecting the claim that the pendency of condemnation proceedings constitutes a constitutional taking of property. *Agins* v. *City of Tiburon*, 447 U.S. 255, 263 n.9. ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, * * * cannot be considered as a 'taking' in the constitutional sense"). Cf. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (no taking where statute forbids sale of property).

3. The court of appeals' distinction between "vacant, unimproved land" and income-producing land (App. A, *infra*, 6a-7a) does not withstand analysis. First, vacant, unimproved land may be income producing, for instance if it is used for grazing or timbering (See, e.g., *Kirby Forest Industries*, *supra*, where the district court, using an analysis like that of the court below, concluded that a timber lot was unimproved, and thus not income producing). And, of course, improved land may be difficult, or even impossible, to rent or to use at a profit for all or part of the time the condemnation suit is pending. It is not clear how the court of appeals would treat such situations.[7] Perhaps more seriously, the distinc-

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[6] Indeed, the Court quoted (308 U.S. at 285, n.20) the reference in *Brown* v. *United States*, 263 U.S. 78, 85-86 (1923) to "the presumption * * * that the valuation included the practical damage arising from the *inability* to sell or lease after the blight of the summons to condemn [emphasis added]."

[7] The same classification problem arises if the land is largely unproductive, but has a few improvements that do produce

tion assumes that unimproved land is necessarily held for speculative purposes, while improved land is not. But improved land may well be held with the intention of upgrading its use, and unimproved land may be held without any intention of deriving any present economic benefit from it. As the dissent below recognized (App. A, *infra*, 9a-12a), there is no reason why only the speculative interests of unimproved landowners merit protection.[8]

The difficulty is not resolved by requiring the court to evaluate the particular motivations of all owners of condemned land, whether income producing or not. A major advantage of the fair market value standard of valuation is to avoid requiring the condemnation court to consider such particular values of the individual tract to the landowner. See, e.g., 1 L. Orgel, *Valuation Under the Law of Eminent Domain*, §§ 14, 74-76 (2d ed. 1953).

4. Fairness does not require the award of interest to the landowner who remains in possession for the period between the entry of judgment and the vesting of title on the payment of that judgment. In *Dan-*

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some income. See, e.g., *United States* v. *Holden*, 268 F. Cas. 223, 224 (N.D.N.Y. 1920) (large tract of land; "for the most part it is a swamp and unproductive", but contains two buildings rented for $25 a month).

[8] Indeed, to the extent that interest is designed to compensate the landowner for the loss of the use of the property between the date of the taking and the payment of the award, the owner of non-productive land—who had no current income from the land before the taking, and thus lost nothing that he previously enjoyed—has a less worthy claim to interest than an owner of income producing property whose ability to continue to gain a return on his land is diminished by the pendency of the proceeding. Cf. *United States* v. *Holden*, *supra*, 268 F. Cas. at 224.

*forth, supra,* this Court recognized the justice of permitting the government a reasonable time to decide whether to acquire the property, once its cost has been established. See also *Tiburon, supra,* 447 U.S. at 263, n.9.[9] If that decision is unreasonably delayed, the landowner may move for dismissal pursuant to Fed. R. Civ. P. 71A(i)(3). In the absence of such a motion, it is reasonable to assume that the landowner does not object to the delay in the payment of the judgment, because he prefers to retain possession of his land, for economic or non-economic reasons.

If the landowner does move for dismissal, he is free at the hearing on the motion to present adequate evidence of any increase in value of the property in the interim in order to demonstrate the inequity of permitting the government to recover on the stale judgment. Cf. *United States* v. *Clarke,* 445 U.S. 253, 258 (1980).

Where, as here, no such evidence has been presented by the landowner [10] the district court correctly refused to assume that the land had increased in value (App. D, *infra,* 16a-17a).[11] Accord, *Gould* v. *United States,* 301 F.2d 557, 560 (D.C. Cir. 1962). In this situation, it is surely reasonable to treat the

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[9] If the government abandons the proceedings, it generally becomes liable to pay the condemnee reasonable attorneys' fees and other litigation expenses. (42 U.S.C. 4654(a)(2)).

[10] The landowner bears the burden of proving the value of the land. *United States ex rel. TVA* v. *Powelson,* 319 U.S. 266, 273 (1943).

[11] Indeed, as the district court noted (App. C, *infra,* 17a), the record evidence indicating "the uniqueness of this land and the particular problems that its development would entail" made reliance on any general escalation in real estate prices particularly inappropriate here.

condemnation transaction like the usual commercial transaction—when payment is received at the time that title and possession of the goods are transferred, no interest is due.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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